Filed 2/2/15 In re Damien J. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re DAMIEN JR., et al., Persons Coming Under the Juvenile Court Law.	B255544
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. M.G., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK84291)

APPEAL from orders of the Superior Court of Los Angeles County. Teresa T. Sullivan, Judge. Affirmed.

Julie E. Braden, under appointment by the Court of Appeal, for Defendant and Appellant.

Richard D. Weiss, Acting County Counsel, Dawyn R. Harrison, Assistant County Counsel, and Jessica S. Mitchell, Deputy County Counsel.

This dependency case involves siblings Damien Jr., D. and Diamond. M.G. (mother) appeals from the orders (1) declaring Diamond a dependent child pursuant to the Welfare and Institutions Code and removing her from mother's custody, and (2) limiting mother to monitored visits with dependent siblings Damien and D.[1] Mother contends the orders were not supported by substantial evidence. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Born in 1989, mother was herself a product of the dependency system. For the most part, she was raised by maternal great-grandmother (MGGM), who was her legal guardian. In 2001, mother was 11 years old when she tested at the "upper range of mild mental retardation to borderline range." Subsequent tests confirmed these results. Mother was later diagnosed with Bipolar Disorder and Attention Deficit Hyperactivity Disorder. In 2009, mother graduated from high school and met Damien Sr. (father). Damien Jr. was born in 2010; D. was born in 2012; and Diamond was born in 2013.

A. Detention of Damien Jr.

An October 2010 referral to the Los Angeles County Department of Children and Family Services (DCFS) alleged infant Damien was the subject of abuse and neglect. A few weeks later, mother was arrested for domestic battery after she physically assaulted father while he was holding Damien. In January 2011, mother submitted on an amended section 300 petition which based jurisdiction over Damien on mother's violent altercation with father and mother's bipolar disease and mild mental retardation diagnoses. Father submitted on a supplemental petition (§ 387), which alleged he had not complied with orders to complete six random drug tests and participate in conjoint counseling. Mother's psychological test results "raise[d] questions about her ability to cooperate with DCFS'[s] reunification efforts." Damien was eventually placed in foster care. Mother's

---

[1] All future undesignated statutory references are to the Welfare and Institutions Code.

reunification services as to Damien were terminated in November 2012, but reinstated in June 2013.

B. Detention of D.

D. was born in February 2012. She was detained in October 2012, following a meeting with DCFS during which mother and father disclosed on-going domestic violence and mother refused to enter a domestic violence shelter. Section 300 jurisdiction over D. was based on mother's and father's unresolved history of domestic violence, father's unresolved history of alcohol abuse, and his failure to regularly drug test. D. was eventually placed in foster care with Damien.

In April 2013, father was convicted of possessing and selling a controlled substance; he was sentenced to probation and ordered into a drug treatment program. In June 2013, the juvenile court ordered unmonitored visits for mother as to Damien and D. Father was given monitored visits with both children.

C. Detention of Diamond

Diamond, who is the subject of the challenged jurisdiction and disposition orders, was born in May 2013. The social worker was at mother's apartment for an unannounced family visit on August 13, 2013, when she observed father enter the apartment with a key. Father denied living there. Diamond was detained from father (but not mother) on August 20, 2013. DCFS filed a section 300 petition which alleged unresolved domestic violence issues (paragraph b-1) and father's unresolved substance abuse (paragraph b-2) as the base of jurisdiction. Pending the jurisdictional hearing, father was ordered not to live with mother; his monitored visits could not take place in mother's apartment and mother could not monitor father's visits.

The event which triggered Diamond's subsequent detention from mother and the change in her visits with Damien and D. occurred on November 5, 2013. That day, mother was scheduled for a morning unmonitored visit with Damien and D. at her

apartment, after which her Independent Living Instructor, Yolanda,[2] planned to take mother and Diamond to the DCFS office for father's monitored visit with Diamond. Yolanda left after father called to cancel his visit with Diamond, but while Damien and D. were still there. Yolanda did not see father at mother's apartment that morning. When foster mother arrived to pick up Damien and D. at about 1 p.m., father carried Damien to her car while mother carried D.; father "reeked" of marijuana. The foster mother reported this information to social worker Annette. When Annette went to mother's apartment a few days later, the apartment was "filthy," including dry vomit everywhere in the bathroom; Annette also noticed a strong odor of marijuana. Mother told Annette there had been a party the night before at which people were drinking alcohol, but mother denied there had been any marijuana. When Annette returned to mother's apartment the next day, it was clean, and Diamond showed no signs of abuse or neglect.

About a week later, mother and father were at the DCFS office for father's monitored visit with Diamond when Annette told them that Diamond was going to be detained at a later date and DCFS was going to seek an order limiting mother to monitored visits with all three children. Mother became belligerent, shouting, "Fuck you, [Annette]," and walking around the lobby. Security was called and father's monitored visit had to be cut short because Diamond was crying.

A few days later, during Diamond's detention at the DCFS office, father "walked toward [social worker Annette] and screamed, 'I am going to blow up your house, blow up you and fuck you up. You are not going to get my child.' " Mother screamed, ' "I hope you die [in] your sleep tonight, you bitch.' " Because of these threats, DCFS assigned a new social worker to the case. A little more than a week later, foster mother asked that the children be removed from her home because she felt threatened by mother and father; foster mother told the social worker that she did not want to appear at the next hearing because she was afraid of mother and father.

---

[2] Because the Independent Living Instructor and the social worker have the same last name, we refer to them by their first names.

At an unannounced visit to mother's apartment on December 11, 2013, the social worker saw father standing outside the gate, smoking a cigarette. In response to the social worker's inquiry, mother said father came to get money and she did not know why he was still there. On January 30, 2014, security had to escort father from the DCFS office during a monitored visit after he became angry about a change in the location of his visits.

D. The February 20, 2014 Hearing

Hearing on DCFS's section 388 petition to change mother's visits from unmonitored to monitored, the jurisdictional hearing as to Diamond, and review hearings for Damien and D. occurred on February 20, 2014. The only witnesses at the hearing were mother, father, Yolanda and foster mother.

Yolanda testified that mother's home was neat and clean and did not smell of marijuana when Yolanda arrived the morning of November 5, 2013. When Yolanda left at noon, she had not seen father at the apartment complex. Yolanda never saw father at mother's home during any of her visits. Nothing about mother's parenting gave Yolanda concern for the safety of any of the children.

Foster mother testified that when she arrived at mother's apartment to pick up Damien and D. at about 1 p.m., on November 5, she followed her usual practice of parking and waiting outside for mother to bring the children to her. On this occasion, father came out of the apartment complex carrying Damien; mother was carrying D. While standing next to father as he helped Damien into the car, foster mother noticed that father "smelled like a little bit like marijuana." Father was smiling and seemed to be moving in slow motion, which were behaviors foster mother had previously observed in people who were under the influence of marijuana. Foster mother reported this information to the social worker. When foster mother arrived to pick up Damien and D. two days later, she went inside to help mother bring the children outside. As foster mother was walking out of the apartment building's front gate with D., the social worker

was walking in the gate. When mother brought Damien to the car moments later, he was crying, "Dada." In the foster mother's experience, Damien Jr. usually repeated "Mama" or "Dada" after he has just seen that parent.

Mother testified that she was not expecting father on November 5. While she was bringing Damien and D. to the foster mother's car, she saw father walking towards her. Father asked mother for his bus pass, which mother had obtained for him from the social worker. Father had never before come over to get his bus pass. Mother told father to come back later. But when Damien said, "Dada" and ran to father, father picked up Damien and carried him out to foster mother's car. At the end of mother's unmonitored visit with Damien and D. on November 7, Annette arrived as mother was transferring the children back to foster mother. When Annette entered the apartment, it was clean except for a pillow, a cup and a plate on the floor. Mother had been sick the night before and there was some vomit on the floor of one of the apartment's two bathrooms that she had not yet cleaned, but mother had closed that bathroom door to keep the children out. Mother never told Annette that there had been a party the night before; no one had been in the apartment smoking marijuana and Annette was lying when she said otherwise. The "marijuana" smell might have been a leaf mother burned to eliminate the odor of dirty diapers. Mother testified inconsistently that father had never been to her apartment before and that he had been to the apartment but never when any of the children were there: "[H]e didn't come to my house. Like, we were outside. He never came in." Mother did not believe that she and father had a history of domestic violence.

Father testified that in October 2013, social worker Annette gave father's bus pass to mother and told father to pick it up from mother; when father was unable to make contact with Annette to make arrangements to pick up his pass the following month, he assumed she had given it to mother again, so he went to mother's home on November 5, to get it. Knowing that he was not allowed to live with mother and she was not allowed to monitor his visits with the children, father planned to arrive after Damien and D. were gone, but he encountered mother and all three children coming down the steps when he arrived. Upon seeing father, Damien said "Dada" and ran towards father. Father picked

up Damien and walked with mother and D. to foster mother's car. Mother told father that she did not have his bus pass, so he left after foster mother left with Damien and D. and mother returned to her apartment with Diamond. The last time father used marijuana was when he tested positive in May or July 2013. Father smoked some cigarettes on November 5, but not marijuana. Father called foster mother to ask whether she had reported seeing him with the children on November 5, because he wanted to know whether his social worker was telling the truth, but he did not threaten foster mother or ask her to lie. When father went to the DCFS offices to surrender Diamond, he did not curse or threaten the social worker. Father believed he used to have an issue with domestic violence, but no longer did. Father wanted to be reunited with his children—either living with mother or in paternal grandparents' ASFA approved home. At the least, father wanted unmonitored visits with his children.

E. The February 20, 2014 Orders

Because the children were at different stages in the dependency process, the juvenile court made separate findings as to each. As to Damien, who was first detained in November 2010, the juvenile court found mother and father had made substantial progress but their participation in the case plan was recent. "The continued violence that . . . occurred in the office while her newborn infant was in her carrier, indicates mother's lack of ability to safely parent [Damien]. [¶] Mother has not made significant progress in resolving the problems that led to the removal of [Damien]. [¶] [Mother] has not demonstrated the capacity and ability to complete the objectives of the treatment plan to provide for [Damien's] safety, protection, physical and emotional health and special needs." Finding it not substantially probable Damien would be returned to mother or father, the juvenile court terminated reunification services as to Damien, ordered monitored visits for mother and father, and set the matter for a section 366.26 hearing.

As to D., who was first detained in October 2012, the juvenile court found mother had completed a parent education program and conjoint counseling; she was participating in Family Preservation services, receiving Regional Center services and was enrolled in

counseling. But she was not under medical care for her psychiatric diagnosis. Mother and father had consistently visited D. The juvenile court concluded, "[Mother and father] have made significant progress in resolving the problems that led to removal of [D.], and have demonstrated the capacity and ability to complete the objectives of the treatment plan to provide for the child's safety, protection, physical and emotional health and special needs." It ordered continued reunification services, monitored visits and set the case for a review hearing.

As to Diamond, the juvenile court found her to be a person described by section 300, subdivision (b). As sustained, the amended section 300 petition alleged: mother and father had an unresolved history of domestic violence, father failed to regularly participate in domestic violence counseling and mother allowed father improper access to Diamond[3] (paragraph b-1); father was a current abuser of marijuana and alcohol and mother failed to protect Diamond from father's substance abuse (paragraph b-2); and mother's home was in an unsanitary condition and smelled of marijuana on November 7, 2013 (paragraph b-3). Custody of Diamond was given to DCFS for suitable placement.

Mother timely appealed from the February 20, 2014 orders.

DISCUSSION

A. Substantial Evidence Supported the Jurisdictional Finding as to Diamond

Mother contends the jurisdictional finding as to Diamond is not supported by substantial evidence. She argues that there had been no recent incidents of domestic violence; father's last positive toxicology was in July 2013; the incident on November 5, 2013, was insufficient to show that mother allowed father access to the children; even if mother's apartment was dirty on November 7, 2013, it was clean the following day and

---

[3] Although not specified in the petition, allowing father access to the children was a violation of orders that father not visit the children in the family home, that mother not monitor father's visits, and that mother and father not visit together.

there was no evidence that Diamond was endangered by the dirty home. We find substantial evidence supports dependency jurisdiction.

Jurisdiction under subdivision (b) of section 300 requires proof of " '(1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) "serious physical harm or illness" to the minor, or a "substantial risk" of such harm or illness." ' [Citation.]" (*In re John M.* (2013) 217 Cal.App.4th 410, 418 (*John M.*) Both domestic violence and substance abuse are grounds for section 300, subdivision (b) jurisdiction. (See *In re Giovanni F.* (2010) 184 Cal.App.4th 594, 598-601 [domestic violence supports jurisdiction under § 300, subds. (a) & (b)]; see also § 300.2 ["[T]he provision of a home environment free from the negative effects of substance abuse is a necessary condition for the safety, protection and physical and emotional well-being of the child . . . ."]; *In re Alexis E.* (2009) 171 Cal.App.4th 438, 451 [illegal use of marijuana supports a finding of substance abuse].) When a dependency petition alleges multiple grounds for dependency jurisdiction, a reviewing court can affirm the jurisdiction finding if any statutory basis is supported by substantial evidence. (*In re Francisco D.* (2014) 230 Cal.App.4th 73, 80 (*Francisco D.*); *In re I.A.* (2001) 201 Cal.App.4th 1484, 1491-1492.)

"Although 'the question under section 300 is whether circumstances *at the time of the hearing* subject the minor to the defined risk of harm' [citation], the court may nevertheless consider past events when determining whether a child presently needs the juvenile court's protection. [Citations.]" (*In re T.V.* (2013) 217 Cal.App.4th 126, 133.) Among the relevant considerations in evaluating the risk of future harm is a parent's ' "current understanding of and attitude toward the past conduct that endangered a child . . . .' " (*John M., supra,* 217 Cal.App.4th at pp. 418-419.)

The juvenile court's finding that a child is a person described by section 300 must be supported by a preponderance of the evidence. (§ 355; *John M., supra,* 217 Cal.App.4th at pp. 410, 418.) On appeal, we review those findings for substantial evidence, which is relevant evidence that " 'adequately supports a conclusion; it is evidence which is reasonable in nature, credible and of solid value.' [Citation.]" (*Francisco D., supra,* 230 Cal.App.4th at pp. 73, 80.)

As we shall explain, substantial evidence supports jurisdiction over Diamond on the grounds stated in paragraphs b-1 (domestic violence) and b-2 (substance abuse) of the petition. Because we find substantial evidence to support jurisdiction under those two paragraphs, we need not decide whether there was also substantial evidence to support jurisdiction on the grounds set forth in paragraph b-3 (unsanitary living conditions).

1. Paragraph b-1 (Domestic Violence)

Mother contends the evidence is insufficient to support jurisdiction on the grounds stated in paragraph b-1 because (1) there had been no recent incidents of domestic violence and (2) there is insufficient evidence she allowed father improper access to the children. Mother does not challenge the finding that father had not regularly participated in court-ordered domestic violence counseling. We find no error.

The undisputed finding that father did not participate in court ordered domestic violence counseling is sufficient to support the finding that mother and father had unresolved domestic violence issues. (See *In re Nolan* (2009) 45 Cal.4th 1217, 1232 [compliance with orders to participate in services is a condition to reunification]; see also *In re Jody R.* (1990) 218 Cal.App.3d 1615, 1624 [failure to participate in court ordered services is prima facie evidence that the conditions which led to the dependency have not been resolved].) This inference is bolstered by evidence that both mother and father had ongoing anger management problems: security had to be called in response to mother's conduct at DCFS's offices in November 2013; security had to be called in response to father's conduct at the DCFS office in January 2014; mother and father threatened the former social worker when Diamond was detained; and foster mother felt so threatened by mother and father that she asked for the children to be removed from her home and she did not want to appear at future hearings. From this evidence, coupled with mother's testimony at the jurisdictional hearing that she did not have a history of domestic violence, the juvenile court could reasonably conclude that mother and father had unresolved domestic violence issues.

From the social worker's report that father entered mother's apartment with his own key on one occasion and that she saw him outside mother's apartment smoking a

cigarette on another occasion, and the undisputed evidence that he brought Damien to foster mother's car on November 5, 2013, the juvenile court could reasonably infer that mother was allowing father unmonitored access to the children in violation of court orders. That mother and father gave an alternate explanation for the fact that father had a key and for his presence on November 5 does not compel a contrary result because the juvenile court was entitled to discredit this conflicting evidence. (*In re Francisco D., supra,* 230 Cal.App.4th at p. 80.)

2. Paragraph b-2 (Father's Substance Abuse)

Mother contends the evidence is insufficient to support jurisdiction on the grounds stated in paragraph b-2 because: (1) father's last positive toxicology was in July 2013, there was insufficient evidence he was using in November 2013, or at the time of the hearing in February 2014, and (2) there was insufficient evidence mother allowed father improper access to the children. Although our findings with respect to paragraph b-1 make it unnecessary to address the sufficiency of the evidence to support paragraph b-2, we exercise our discretion to do so because a finding that father continues to have substance abuse problems may have ramifications for him in other aspects of the dependency proceedings.

We set forth the evidence of father's access to the children in the prior section and need not repeat it here. Regarding the evidence of father's unresolved substance abuse, although father's last positive drug test was on May 23, 2013, father was a "no show" for the next four tests. A "no show" is equivalent to a positive test. (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1217 [a missed drug test is properly considered the equivalent of a positive test result].) Father followed the four "no shows" with nine negative tests in a row, but he was a "no show" again on December 26, 2013, which was equivalent to a positive test just two months before the February 2014 jurisdictional hearing. Further, despite negative drug tests on October 28, 2013, and November 14, 2013, foster mother's statement to the social worker that father "reeked" of marijuana when she was standing next to him outside mother's apartment on November 5, 2013, as well as foster mother's trial testimony that father smelled like marijuana and was acting

in a manner consistent with being under the influence that day, is substantial evidence from which the juvenile court could reasonably infer that father was using on that date and that he was using in proximity to the children.

B. Removal of Diamond From Mother's Physical Custody Was Not An Abuse of Discretion

Mother contends removal of Diamond from her custody was an abuse of discretion. She argues insufficient evidence supported the juvenile court's finding that returning Diamond to her custody presented a substantial danger to Diamond's physical or emotional well-being. We disagree.

Custody of a dependent child may not be taken from his or her custodial parent "unless the juvenile court finds clear and convincing evidence . . . [¶] (1) There is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home . . . ." (§ 361, subd. (c)(1).) Among the factors that may be considered is evidence that a parent is in denial about the problem that brought the child into the dependency system. (See *In re Esmeralda B.* (1992) 11 Cal.App.4th 1036, 1044.) In *In re J.S.* (2014) 228 Cal.App.4th 1483, for example, the appellate court rejected the mother's challenge to removal of her children, which was premised on her claims that domestic violence was no longer a concern because she and the father were no longer living together. The court reasoned that the last incident of domestic violence occurred when the mother and father were not living together, and there was evidence that they still had a relationship. (*Id*. at p. 1493.)

Here, as a preliminary matter, we note that the record does not support mother's assertion that the juvenile court used the incorrect "preponderance of the evidence" standard, rather than the correct "clear and convincing" standard, to find a substantial danger if Diamond were returned to mother. The "clear and convincing" standard applies only at the initial dispositional hearing. (§ 361, subd. (c)(1); see *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1656 [use of the heavier "clear and convincing" "burden of proof at the dispositional stage of dependency proceedings is intended to protect the fundamental

right of a parent to *retain* custody of a child." (Italics added.)].) At each subsequent six-month review hearing, the juvenile court uses the "preponderance of the evidence" standard to determine whether *return* of the child to his or her parent would create a substantial risk of detriment to the child's safety, protection, or physical or emotional well-being. (§ 366.21, subd. (e).) At the reporter's transcript page to which mother cites in her Opening Brief, the juvenile court correctly used the "preponderance of the evidence" standard to find Diamond was a dependent child; it correctly used the same standard to find *return* of Damien and D. would create a substantial risk of harm to them. Later at the same hearing, the juvenile court expressly used the "clear and convincing" standard to make the initial dispositional finding required by section 361, subdivision (c)(1), that returning Diamond to mother's custody presented a substantial danger to Diamond. We next turn to the sufficiency of the evidence to support the juvenile court's finding.

At the hearing, the juvenile court found Diamond's siblings could not then be returned to the parents. As to Damien, the court found there was no substantial probability that he would later be returned to his parents, because they had only recently become compliant with the case plan. In particular, the court noted mother's violent outburst at the DCFS offices "while [Diamond] was in her carrier, indicates mother's lack of ability to safely parent [Damien]." These same facts support the juvenile court's conclusion that mother could not yet safely parent Diamond, who was still an infant. Mother's denial that she had a history of domestic violence, as well as her denial that she was giving father access to the children, also supports this conclusion. Thus, there was substantial evidence that return to mother presented a substantial danger to Diamond's well-being.

C. Changing Mother's Visitation With Damien and D. From Unmonitored to Monitored Was Not An Abuse of Discretion

On September 24, 2013, the juvenile court ordered DCFS not to restrict mother's unmonitored visits absent a court order. Less than two months later, social worker

Annette filed a section 388 petition seeking to change mother's visits from unmonitored to monitored based on the November 5, 2013 incident. Mother contends it was an abuse of discretion for the juvenile court to change mother's visits with Damien and D. to monitored because no substantial evidence supported the findings that father was using marijuana and mother had allowed father access to the children.

As we have already explained, there was substantial evidence that (1) father was using marijuana as recently as December 26, 2013, when he did not appear for his drug test, and (2) mother allowed father unmonitored access to the children in violation of prior visitation orders. Thus, mother's sufficiency of the evidence argument as to the change in visitation order also fails.

DISPOSITION

The orders appealed from are affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.